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Md Nor bin Kassim v Malayan Banking Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–1751–10 OF 2014
DAVID WONG, UMI KALTHUM AND ABDUL RAHMAN SEBLI JJCA
19 MAY 2017

C *Civil Procedure — Judicial review — Appeal against — Appellant dismissed by respondent from employment on ground of grave misconduct — Industrial Court found appellant was dismissed without just cause or excuse and ordered appellant to be reinstated — Respondent filed judicial review — High Court found in favour of respondent and quashed award of Industrial Court — Whether alleged conduct*
D *of appellant amounted to sexual harassment — Whether learned Industrial Court chairman committed serious errors of law in disregarding weight of evidence attesting to misconduct of appellant*

E The appellant was a branch manager at the respondent's bank, Malayan Banking Bhd. It was alleged by one of the respondent's employee ('COW1') that the appellant had sexually harassed her. The alleged sexual harassments referred to were that the appellant had on several occasions sent SMS's containing inappropriate words such as 'ILU' which stands for 'I love you'; and
F the act of the appellant lending a book entitled '100 Rahsia Kehebatan Lelaki' ('the said book') to COW1. The respondent's domestic disciplinary inquiry found the appellant guilty of grave misconduct and dismissed the appellant from service. The matter was then referred to Industrial Court ('the IC') for resolution. The IC found in favour of the appellant and held that the appellant
G was dismissed without just cause or excuse and ordered the appellant to be reinstated to his former position ('the award'). Dissatisfied with the award, the respondent then filed a judicial review application in which the learned High Court judge had quashed the award premised on the finding that the appellant's conduct constituted sexual harassment and that the dismissal was
H just and fair. This was an appeal against the decision of the learned High Court judge on the judicial review application. The issues for court's determination were: (a) whether the alleged conduct of the appellant amounted to sexual harassment; and (b) whether the learned IC chairman had committed serious
I errors of law in disregarding the weight of evidence attesting to the misconduct of the appellant.

Held, allowing the appeal, setting aside the order of the High Court and reinstating the award of the IC with costs of RM15,000:

(1) The court was not in agreement with the findings of the learned High Court judge who viewed the appellant's conduct against COW1 amounted to sexual harassment. The conduct of COW1 upon being given the said book did not indicate that she abhorred and loathed the whole transaction. If she felt harassed by the conduct of the appellant, she would not keep the book. The evidence showed that she kept the book for one week and only returned the said book after the appellant requested for its return. In addition, she did in fact discuss the contents of the book with one Abdul Rahman bin Hood (see paras 21 & 26).

(2) The court would be cautious in reviewing the findings of fact made by the learned chairman of the IC who had seen and heard witnesses on the alleged sexual harassment of the appellant where the learned chairman noted that there were inconsistencies in the evidence of COW1 that required corroboration of other witnesses. The court disagreed with the review made by the learned High Court judge. There was no illegality in the findings of fact by the learned IC chairman nor could it be said to be plainly irrational in all the circumstances of the case. On the contrary, there had been an in-depth and proper appreciation of the facts and law by the learned chairman. A reasonable tribunal similarly circumstanced would have arrived at the same decision. Thus, the learned High Court judge's intervention on the findings of fact was erroneous and flawed (see paras 27–29).

[Bahasa Malaysia summary

Perayu adalah pengurus cawangan di bank responden, Malayan Banking Bhd. Dia didakwa oleh salah seorang pekerja responden ('COW1') bahawa perayu telah menganggunya secara seksual. Dakwaan gangguan seksual yang dirujuk adalah bahawa perayu telah beberapa kali menghantar SMS mengandungi perkataan-perkataan yang tidak patut seperti 'ILU' yang bermaksud 'I love you'; dan tindakan perayu meminjamkan buku bertajuk '100 Rahsia Kehebatan Lelaki' ('buku tersebut') kepada COW1. Siasatan tatatertib domestik responden mendapati perayu bersalah terhadap salah laku serius dan membuang perayu daripada kerja. Perkara kemudiannya dirujuk kepada Mahkamah Perusahaan ('MP') untuk resolusi. MP memihak perayu dan memutuskan bahawa perayu dibuang kerja tanpa sebab atau alasan dan memerintah perayu untuk kembalikan kepada jawatannya ('award'). Tidak puas hati dengan award tersebut, responden kemudiannya memfailkan permohonan semakan kehakiman di mana hakim Mahkamah Tinggi telah membatalkan award tersebut berdasarkan atas dapatan bahawa tingkah laku perayu membentuk gangguan seksual dan bahawa pembuangan kerja adalah adil dan saksama. Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi atas permohonan semakan penghakiman. Isu-isu untuk penentuan mahkamah adalah: (a) sama ada dakwaan tingkah laku perayu merupakan gangguan seksual; dan (b) sama ada pengerusi MP yang bijaksana telah

melakukan kesilapan serius undang-undang kerana tidak memperdulikan keberatan keterangan yang membuktikan kepada tingkah laku perayu.

Diputuskan, membenarkan rayuan, mengetepikan perintah Mahkamah Tinggi dan mengembalikan semula award MP dengan kos sebanyak RM15,000:

(1) Mahkamah tidak bersetuju dengan dapatan hakim Mahkamah Tinggi yang berpendapat bahawa perlakuan perayu terhadap COW1 merupakan gangguan seksual. Perlakuan COW1 setelah diberi buku tersebut tidak menunjukkan yang dia meluat dan benci keseluruhan kejadian tersebut. Jika dia berasa diganggu oleh perlakuan perayu, dia tidak akan menyimpan buku tersebut. Keterangan menunjukkan bahawa dia simpan buku tersebut selama satu minggu dan hanya memulangkan buku tersebut selepas perayu meminta untuk pemulangannya. Selanjutnya, dia sebenarnya membincang isi kandungan buku tersebut dengan seorang yang bernama Abdul Rahman bin Hood (lihat perenggan 21 & 26).

(2) Mahkamah akan berhati-hati dalam menyemak dapatan fakta yang dibuat oleh pengerusi MP yang bijaksana yang telah melihat dan mendengar saksi-saksi atas dakwaan gangguan seksual perayu di mana pengerusi yang bijaksana menerima bahawa terdapat ketidakkonsistenan dalam keterangan COW1 yang memerlukan sokongan daripada saksi-saksi lain. Mahkamah tidak bersetuju dengan semakan yang dibuat oleh hakim Mahkamah Tinggi. Tidak terdapat kesalahan dalam dapatan oleh pengerusi MP yang bijaksana ataupun ia dapat dikatakan jelas tidak rasional dalam kesemua keadaan kes. Sebaliknya, terdapat penilaian secara terperinci dan betul terhadap fakta dan undang-undang oleh pengerusi yang bijaksana. Tribunal yang munasabah dalam keadaan yang serupa akan mencapai kepada keputusan yang sama. Oleh itu, campur tangan hakim Mahkamah Tinggi ke atas dapatan adalah salah dan cacat (lihat perenggan 27–29).]

Notes

For cases on appeal against judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5933–5935.

Cases referred to

Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal [2001] 4 MLJ 97; [2001] 3 CLJ 9, CA (refd)

Ketua Pengarah Buruh v Britania Brands (M) Sdn Bhd [2010] MLJU 504; [2010] 6 CLJ 370, CA (refd)

Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor [2014] MLJU 1872; [2015] 4 CLJ 295, CA (refd)
Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor [2016] 4 MLJ 282; [2016] 6 CLJ 346, FC (refd)
Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)

Appeal from: Judicial Review No 25–16–03 of 2014 (High Court, Johor Bahru)

KS Pang (KS Pang & Co) for the appellant.
T Thavalingam (Lisa Tan Yu Wan with him) (Lee, Hishammuddin Allen & Gledhill) for the respondent.

Umi Kalthum JCA:

INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge in allowing a judicial review application. The learned High Court judge granted a certiorari order to quash an award of the Industrial Court dated 3 March 2014 ('the award') which had earlier found that there was an unfair dismissal of the appellant.

BRIEF FACTS

[2] The appellant in this appeal ('Md Nor bin Kassim') was a branch manager at the respondent's bank, Malayan Banking Bhd ('MBB'). The post of branch manager is a senior executive position of trust and responsibility involving the management of subordinate staff.

[3] On 28 January 2010, the respondent received a verbal report from its staff, Rohaida bt Kamarudin ('COW1'), that the appellant had sexually harassed her. COW1 lodged two police reports on 1 February 2010 and 17 February 2010 respectively (pp 155 and 157, appeal record *Jld* 3).

[4] The alleged sexual harassments referred to are as follows:

(a) the appellant had on several occasions sent SMS's containing inappropriate words such as 'ILU' which stands for 'I love you'; and

(b) the act of the appellant lending a book entitled '100 Rahsia Kehebatan Lelaki' to COW1.

[5] In response to these allegations, the respondent carried out investigation of the alleged misdemeanours of the appellant.

[6] Investigations revealed that the alleged incidences were not isolated incidents and COW1 was not the only victim of the alleged sexual harassment. Apparently, there were other female staff who suffered similar harassment but did not report these incidences for fear of being victimised by the appellant who was then their superior.

[7] The respondent had subsequently issued a suspension letter dated 9 February 2010 to the appellant as a result of the alleged misconduct. The suspension took effect from 10 February 2010 pending the disposal of the disciplinary proceedings against the appellant before the domestic disciplinary inquiry ('DI') of the respondent.

[8] The DI found the appellant guilty of grave misconduct and dismissed the appellant from service with effect from 22 August 2010. Dissatisfied with the dismissal, the appellant referred the matter to the Industrial Relations Department which in turn referred the dispute to the minister who then referred the dispute to the Industrial Court for resolution.

[9] The Industrial Court after having heard the matter found in favour of the appellant in that the appellant was dismissed without just cause or excuse and ordered the appellant to be reinstated to his former position.

[10] The respondent then filed an application for a judicial review to the High Court seeking an order of certiorari to quash the award.

AT THE HIGH COURT

[11] The learned High Court judge however allowed the judicial review application and issued a writ of certiorari to quash the award. The learned High Court judge found that the learned Industrial Court chairman had committed serious errors of law in arriving at his award. The learned High Court judge further noted that the learned Industrial Court chairman, among others, had taken into account irrelevant considerations, failed to take into account relevant considerations and material facts and had acted against the weight and totality of the evidence in dismissing the charges against the appellant in entirety.

[12] The appellant, dissatisfied with the decision of the learned High Court judge appealed to this court.

THE APPEAL

[13] We were of the considered view that the determining issues in this appeal were whether the alleged conduct of the appellant in the aforesaid incidences amounted to sexual harassment and whether the learned Industrial Court chairman had committed serious errors of law in disregarding the weight of evidence attesting to the misconduct of the appellant.

[14] A reference is made to the the Court of Appeal case of *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2014] MLJU 1872; [2015] 4 CLJ 295 where Zaharah Ibrahim JCA (as she then was) quoted, at p 304, the definition of sexual harassment from a Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace as follows (this decision was later affirmed by the Federal Court in *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282; [2016] 6 CLJ 346):

> [34] The Malaysian Government had accepted that sexual harassment in the workplace, especially, is to be abhorred. In 1999 a Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace was formulated by the Government and employers were urged to adopt it. While the code has no force of law, it signalled in the change in the mindset of the authorities on sexual harassment in the workplace.
>
> [35] In the code, sexual harassment is defined as:
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> > Any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment:
> >
> > > – that might, on reasonable grounds be perceived by the recipient as placing a condition of a sexual nature on her/his employment; or
> > >
> > > – that might, on reasonable grounds, be perceived by the recipient as an offence or humiliation, or a threat to his/her well-being, but has no direct link to her/his employment.

[15] The appeal before us is an appeal in relation to a judicial review application where the learned High Court judge had quashed the award premised on the learned judge's finding that appellant's conduct constituted sexual harassment and that the dismissal was just and fair.

[16] Gopal Sri Ram JCA (as he then was) in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 at p 353; [1995] 2 CLJ 748 at p 775 paras a–b (CA), observed that a High Court in exercising its supervisory jurisdiction in a judicial review application from an Industrial Court does not act as an appellate court but should only concern

itself with the *decision making process, not the merits of the decision itself.*

[17] The same approach was echoed in the decision of *Ketua Pengarah Buruh v Britania Brands (M) Sdn Bhd* [2010] MLJU 504; [2010] 6 CLJ 370 at p 384, where Abdul Malik Ishak JCA (as he then was) noted the following:

> [32] It must be borne in mind that the remedy of judicial review is concerned with reviewing and is not concerned with the merits of the decision in respect of which the application for judicial review is made. The court is concerned to look at the decision making process itself ...

[18] It is evidently clear that a High Court, in reviewing a decision of a quasi-judicial body such as the one in this appeal, must shift its focus on the manner in which a decision is reached. The court should focus on the process of decision making and not the outcome.

[19] The learned High Court judge in this judicial review application made a specific finding that the learned chairman of the Industrial Court had erred in holding that the evidence on sexual harassment required corroboration to be relied upon against the appellant.

[20] In addition to that, the learned High Court judge also made a specific finding that the impugned SMS's and telephone messages sent by the appellant to COW1 were indeed explicitly obscene, outrageous and of a sexual character and it was irrelevant for the learned Industrial Court chairman to rest on the fact that COW1 did not suffer any injuries as one of the consideration for his decision.

[21] At this juncture, a careful inspection of the manner in which the learned Industrial Court chairman concluded that there was no improper misconduct of the appellant that could tantamount to sexual harassment is essential. The finding of the learned Industrial Court chairman was premised on the fact of the act of lending the book entitled '100 Rahsia Kehebatan Lelaki' by the appellant to the COW1. This fact was never denied by the appellant. The learned chairman observed that it would be difficult to conclude that the act of lending the said book to COW1 would amount to an act of sexual harassment when COW1 did not register any resentment or discomfort upon receiving the book. Moreover, she had kept it further for one week and had told the contents of the said book to Encik Abdul Rahman bin Hood ('COW3'), even though she had denied reading the said book. We agreed with the finding of the learned chairman on this aspect when he found that if COW1 was not interested in the said book she could have easily turned down the offer to lend the said book to her by the appellant. Furthermore, COW1 had handed over the said book to her husband to read — this certainly did not show her distaste of being lent the said book by the appellant. The following is an excerpt of the relevant

cross-examination of COW1 (at p 65, core bundle):

S: Anda telah meminta pinjam buku ini daripada Pihak Menuntut?

J: Tidak.

S: Anda simpan buku ini selama satu minggu?

J: Ya.

S: Anda serah kepada suami anda untuk baca?

J: Ya.

S: Buku ini berkenaan seks dan pemakanan juga?

J: Saya tidak tahu kerana tidak baca.

S: Anda telah membaca buku ini bersama-sama suami anda?

J: Tidak.

S: Anda telah menceritakan isi kandung buku ini kepada COW3?

J: Ya, betul.

S: Anda sanggup menceritakan isi kandungan buku ini kerana anda telah membacanya?

J: Tidak.

[22] In relation to the alleged SMS's of obscene nature by the appellant to COW1, the learned chairman's finding was that it had occurred between the years 2008–2009 and the SMS's which contained the abbreviation of 'ILU' that stood for 'I Love You' was found to be of motivational in nature. The learned chairman found that there was no evidence to suggest that the same SMS was not sent to any other subordinates and that COW1 was the only recipient of such SMS.

[23] The aforementioned findings of the learned chairman were in fact findings of fact. This was done based on the credibility of the witnesses. The position of the law in relation to the judicial review is clear. The review court must not disturb the findings of fact unless they were findings that were so unreasonable in its defiance of logic that no tribunal similarly circumstanced could reasonably reach to that finding.

[24] The Court of Appeal, per Gopal Sri Ram JCA, in the case of *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97; [2001] 3 CLJ 9 observed, at p 105 (MLJ); p 17 (CLJ) that:

> ... This was a finding of fact based on the credibility of witnesses. It was immune from judicial review. Yet the learned judge set this finding aside and awarded compensation to the respondents until they attained 60 years of age. This was clearly wrong.

[25] Conversely, the Federal Court, as per Steve Shim CJ (Sabah and Sarawak) (as he then was), in the case of *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288 at p 297; [2003] 4 CLJ 625 at p 637, stated as follows:

> Quite clearly the Industrial Court had found the respondent to be impatient. A reviewing judge might not have come to the same conclusion from the established facts but he should exercise restraint. He should not disturb such finding unless it could be shown to be based on grounds of illegality or plainly irrational ...

[26] We found ourselves not in agreement with the findings of the learned High Court judge who viewed the appellant's conduct against COW1 amounted to sexual harassment. The conduct of COW1 upon being given the said book did not indicate that she abhorred and loathed the whole transaction. If she felt harassed by the conduct of the appellant, she would not have kept the book; the evidence showed that not only did she keep the book for one week and only returned the book after the appellant requested for its return. In addition, she did in fact discuss the contents of the book with COW3.

[27] Further, this court would be cautious in reviewing the findings of fact made by the learned chairman of the Industrial Court who had seen and heard the witnesses, especially that of COW1 and COW8 on the alleged sexual harassment of the appellant where the learned chairman noted that there were inconsistencies and uncertainties in the evidence of COW1 that required corroboration of other witnesses.

[28] Thus, with respect, we were unable to agree with the review made by the learned High Court judge. In our view, there was no illegality in the findings of fact by the learned Industrial Court chairman nor could it be said to be plainly irrational in all the circumstances of the case. On the contrary, we observed that there had been an indepth and proper appreciation of the facts and law by the learned chairman. The learned chairman had taken into account the whole circumstances of the professional relationship between the witnesses and the appellant.

[29] It was also our considered view that a reasonable tribunal similarly circumstanced would have arrived at the same decision. The learned High Court judge's intervention on in the findings of fact was in our view erroneous and flawed.

[30] Thus, for the reasons given, we were of the unanimous view that the appeal must be allowed. The order of the High Court was set aside and the award of the Industrial Court was reinstated. The respondent was ordered to pay the agreed costs of RM15,000 to the appellant. The deposit was refunded.

Appeal allowed; order of the High Court set aside; and award of the IC reinstated with costs of RM15,000.

Reported by Dzulqarnain Ab Fatar